



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

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Order Instituting Rulemaking to Implement the)
Commission's Procurement Incentive Framework)
and to Examine the Integration of Greenhouse)
Gas Emissions Standards Into Procurement)
Policies.)

R.06-04-009

BEFORE THE CALIFORNIA ENERGY COMMISSION

In The Matter Of,)
)
AB 32 Implementation – Greenhouse Gas)
Emissions.)

Docket 07-OIIP-01

REPLY OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO
COMMENTS AND LEGAL BRIEFS ON MARKET ADVISORY COMMITTEE
REPORT

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Dated: **August 15, 2007**

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REPORT**

Pursuant to the *Administrative Law Judge's Ruling Regarding Comments and Legal Briefing on Market Advisory Committee Report*, issued July 19, 2007, and the *Administrative Law Judge's Ruling Requesting That Parties Address an Additional Legal Issue*, issued August 8, 2007 ("Ruling on Additional Legal Issue"), Southern California Edison Company ("SCE") submits these reply comments addressing various general issues raised by parties to this proceeding. SCE notes that because of the volume of comments received, it is impossible to address them all here. However, SCE looks forward to responding to any additional questions the California Public Utilities Commission ("CPUC"), California Energy Commission ("CEC"), and other parties may have at the upcoming *en banc* hearing on the deliverer/first seller ("First Seller") proposal set forth in the *Recommendations for Designing a Greenhouse Gas Cap-and-*

Trade System for California (“Report”) prepared by the California Market Advisory Committee (“CMAC”) or in any other forum the CPUC or CEC may choose.

Although SCE addresses issues such as market liquidity, data requirements, and certain legal questions in this reply brief, it also wishes to reiterate the reasons why a load-based approach is not the most effective and efficient way for California to implement its greenhouse gas (“GHG”) emissions reduction legislation. Among these are the following:

- A load-based approach will not produce accurate reporting of GHG emissions;
- A load-based approach will likely distort electricity markets;
- A load-based approach will likely interfere with the California Independent System Operators Market Redesign Technology Update (“MRTU”); and
- A load-based approach does not adequately address leakage and contract shuffling.

I.

SCE’S REPLY TO PARTIES’ SPECIFIC CONCERNS

A. Allegations Regarding the Effect of a First Seller Construct on the Market and Liquidity are Speculative and Baseless

Various parties argue that a First Seller approach will result in firms abandoning sales into California.¹ They predict that the regulatory burden will be such that firms will elect to do business elsewhere resulting in higher prices in, and reliability concerns for, California. This

¹ *PacifiCorp’s Response to Administrative Law Judge’s Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report*, dated August 6, 2007 (“PacifiCorp Comments”), at 8; *Opening Comments of the Salt River Project Agricultural Improvement and Power District on the Administrative Law Judges’ Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report*, dated August 6, 2007 (“Salt River Comments”), at 4-5; *Southern California Public Power Authority Comment on Market Advisory Committee Report*, dated August 6, 2007 (“SCPPA Comments”), at 13.

same argument is made with regard to renewables.² These assertions are highly speculative and should therefore not be accorded much weight.

There are many regulatory and operational issues that sellers wishing to export to any state or Balancing Authority face. The market currently addresses such issues through appropriate contracting. Such contracts may address which party must comply with the regulation or may simply include a pricing premium for risks associated with the market and/or regulatory activity. As western markets evolve, SCE expects that the prices, terms, and conditions of contracts will likewise evolve. While the absolute price of electricity in California will likely be higher after GHG emissions regulations are implemented, there is simply no reason to believe that an entity, be it a generator, marketer, banker, or load-serving entity (“LSE”), will abandon a transaction which offers incremental benefit to it, once all costs and risks have been appropriately addressed.³

B. The Data Requirements of the First Seller Approach Are Not Significant Enough to Warrant Rejection of the Approach

Several parties seem to urge the CPUC and CEC to stop discussion, analysis, and development of a First Seller option for GHG emissions reduction compliance by raising the specter of uncontrolled regulation with vast data requirements both for a regulating agency and for regulated entities.⁴ One party, for example, asserts that “seventy California entities . . . could be regulated under a load-based approach versus literally hundreds, perhaps thousands, of electricity generators and power marketers located throughout the Western Electricity

² *CalEnergy Operating Corporation’s Response to Administrative Law Judges’ Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report*, dated August 6, 2007 (“CalEnergy Comments”), at 3; PacifiCorp Comments at 9.

³ Notably, with regard to renewables, at least one renewable generator recognized that “RPS facilities are only going to grow in value due to the increasing reliance that is being placed on the sector due to evolving public policy.” *Comments of Covanta Energy Corporation on the Market Advisory Committee Report*, dated August 6, 2007, at 6. It is difficult to imagine that the requirements placed on a First Seller would be enough to send developers elsewhere when California is placing a premium on “cleaner” resources.

⁴ PacifiCorp Comments at 2.

Coordinating Council . . . would need to be overseen by California under ‘first seller’ approach.”⁵

This assertion overstates the number of potentially regulated entities under a First Seller approach. In all of North America, there are only 1,099 entities registered as a Purchasing Selling Entity (“PSE”) or Control Area. Most of these entities are not within the Western Electricity Coordinating Council (“WECC”) interconnection and therefore would not likely transact in California. When paring the list down to just PSEs and Control Areas within WECC, the list currently includes about 100 entities. Notably, this list includes substantially all of the entities which some parties believe will be regulated under a load-based approach.

The comparison of the burden of regulation under a load-based approach versus the scope of regulation under a First Seller approach is also inappropriate because it fails to account for how either a load-based or a First Seller approach will actually be implemented. Under a load-based approach, the state must track individual transactions conducted by each LSE. This makes the relevant number for benchmarking the complexity of reporting under the load-based approach is the number of LSEs times the number of transactions per LSE. Some parties have completely ignored this part of the calculation.

Under a First-Seller approach, it is not necessary for the specified regulatory agency to track LSE transactions. Rather, that agency need only track the total emissions for each in-state generator (on an aggregate, as opposed to on a transaction-by-transaction, basis) and the emissions associated with import transactions.⁶

The CAISO’s data can be used to estimate the complexity of tracking and reporting under a First Seller approach. Multiplying 600 E-tags per day, times 365 days, and adding in a requirement to track total annual emissions from each generator, produces 22,000 data elements

⁵ PacifiCorp Comments at 8.

⁶ According to the recent California Independent System Operator (“CAISO”) presentation, there are 1,356 generators in the CAISO and 600 NERC E-tags generated per day for imports into CAISO. *Tagging Under MRTU New Interchange Transaction Schedule System for CAISO*, presentation to WECC Interchange Scheduling and Accounting Subcommittee by Kyle T. Hoffman, Manager Scheduling, CAISO, given in Boise, Idaho, on August 8, 2007.

for First Seller reporting in CAISO. Based on this number of data elements, tracking and reporting under the First Seller approach seems manageable.

By contrast, according to CAISO, for each hour, on average, there are approximately 714 generation schedules, 800 to 1,000 energy custody change schedules, 99 load schedules, and 320 intertie schedules. This represents nearly 18 million schedules per year in the CAISO's system that would have to be tracked, in addition to bilateral transactions that do not involve CAISO schedules, to accurately trace the path of electrical energy from source to LSE sink under a load-based approach. Given the size of this number and for the other reasons discussed in SCE's previous comments, emissions tracking under a load-based approach only becomes administratively feasible when individual transactions and schedules are ignored and default emissions factors are employed. However, this comes at the price of accuracy and also introduces several gaming opportunities as SCE has previously explained. Accordingly, the load-based approach seems far inferior to the First Seller approach in terms of the regulatory burden that will be imposed by a load-based system.

C. Assembly Bill 32 Does Not Require Adoption of a Load-Based System

Certain parties assert that a First Seller approach should not be considered because the text of Assembly Bill ("AB") 32 requires adoption of an approach that regulates consumers, not producers, of electricity.⁷ This argument is meritless.

The text of AB 32 clearly states that the Legislature's intent:

It is the intent of the Legislature that the State Air Resources Board design emissions reduction measures to meet the statewide emissions limits for greenhouse gases established pursuant to this division in a manner that minimizes costs and maximizes benefits for California's economy, improves and modernizes California's infrastructure and maintains electric system reliability, maximizes additional environmental and economic co-benefits for California and complements the state's efforts to improve air quality.⁸

⁷ SCPPA Comments at 5-6.

⁸ Cal. Health & Safety Code § 38501(h).

This and other statements of the Legislature’s intent make no mention of a legislative desire to enact a load-based system. Instead, they clearly leave open the means by which compliance with the legislation will be achieved.

Additionally, although parties cite to statutory language referring to electricity consumption, they fail to note that the statute specifically requires adoption of regulations that “[r]equire the monitoring and annual reporting of greenhouse gas emissions from greenhouse gas emissions sources beginning with the sources or categories of sources that contribute the most to statewide emissions.”⁹ Statements such as this one squarely refute the idea that AB 32 requires adoption of a load-based approach to GHG emissions regulation.

D. California’s Renewable Portfolio Standard and Energy Efficiency Programs Will Not be Affected by Adoption of the First Seller Proposal

Certain parties argue that adoption of the First Seller approach will remove the various incentives which have, to date, encouraged the development of renewables in California.¹⁰ There are no grounds for this assertion. The First Seller approach will not affect the Renewables Portfolio Standard (“RPS”) or energy efficiency programs as they exist now because, under AB 32, the CPUC’s independent authority and responsibilities over RPS and energy efficiency issues are not in any way abrogated.¹¹ Parties asserting the contrary make no effort to explain their reasoning for how AB 32 could affect the CPUC’s authority over the RPS or energy efficiency programs.

⁹ *Id.* at §38530(b)(1).

¹⁰ *See e.g.*, CalEnergy Comments at 5-6; PacifiCorp Comments at 9.

¹¹ *See Comment of Morgan Stanley Capital Group Inc. on the Market Advisory Committee To the California Air Resource’s Board’s Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California*, dated August 6, 2007 (“Morgan Stanley Comments”), at 16 (“Operationally, they are two separate programs, and do not directly interface, despite the fact that their innate purposes are very similar.”)

E. Proposals Requesting Limits on Non-Source-Specific Transactions Should be Rejected

Some parties propose to make emission reduction and tracking more effective by adopting measures to discourage the use of non-source specific transactions.¹² It is unclear what target reduction these parties recommend for reducing non-source-specific transactions. It is also unclear what specific measures these parties would support to achieve that target. These reasons alone warrant rejection of such proposals. Additionally, for the reasons set forth below, SCE urges the CPUC to reject any proposals which would discourage of non-source-specific transactions.

First, various forms of legislation have already been implemented to discourage certain types of contracting. For example, the CPUC has already implemented regulations to prevent long-term investment in power plants that do not meet a certain emissions profile pursuant to Senate Bill 1368.¹³ Additionally, AB 32 requires that emissions reductions measures achieving GHG reduction be accomplished in a cost effective manner. Discouraging the use of non-source specific transactions would not comply with that legislative mandate.

Second, suggestions discouraging the use of non-source specific transactions fail to recognize the role of such purchases in the cost effective procurement of energy. To eliminate or significantly reduce such alternatives would unnecessarily increase electricity costs to California's ratepayers. As SCE has previously noted, "Today, SCE conducts approximately 20,000 electric energy transactions per year to meet the CPUC's requirement of least-cost dispatch of SCE's portfolio. Virtually all of these transactions are non source-specific, time-

¹² PacifiCorp Comments at 3 ("[t]he Commission should explore procurement or contracting rules (i.e., standard contracting provisions) that encourage LSEs to develop energy portfolios that consist mainly of owned generation or source-specific contracted generation, and discourage non source-specific transactions.")

¹³ See Decision No. 07-01-039 at 8.

critical transactions conducted in day-ahead and hour-ahead markets to balance SCE's supply and demand on a least-cost basis."¹⁴

If any proposal to eliminate (or significantly restrict) non-source-specific transactions is adopted, SCE will lose (or have limited capability to use) its most important tool in achieving least-cost dispatch of its portfolio. Least-cost dispatch is achieved in the WECC today by bilateral non-source-specific transactions among market participants. Market participants having sales or retail obligations, for example, can choose not to operate their own generation that has a higher operating cost than the market price for power, and instead buy substitute power at the lower market price. Market participants operating all generation in their portfolio, having an operating cost less than the market price for power, can also sell any surplus energy in their portfolio beyond their sales or retail obligations, producing net revenue gains. In effect, all market participants, whether generators, LSEs, marketers, or financial institutions, use non-source-specific transactions to balance their own portfolios (that is, achieving a portfolio net-short, or net-long, position that is approximately equal to zero) to achieve least-cost on an individual basis, with the result being least-cost on a system-wide basis. If this tool is taken away (or severely restricted) under a load-based cap in order to facilitate accurate tracking of GHG emissions from source to LSE, significant barriers to commerce will be created such that regulators should not expect least-cost dispatch to be achieved. Below are some examples of the impact on commerce and least-cost dispatch if non-source-specific transactions are banned or restricted.

- For any source-specific transactions, the individual unit(s) sourcing the sale must be identified, and parties must determine and deal with issues such as the unit(s) tripping off line, loss (or de-rating) of transmission from the unit(s), transmission congestion costs, etc. In other words, there would be no standard contract that

¹⁴ See Reply Comments of Southern California Edison Company (U 338-E) Regarding Joint California Public Utilities Commission and California Energy Commission Staff Proposal for an Electricity Retail Provider GHG Protocol, dated July 10, 2007 ("SCE Reply Comments"), at 7.

could quickly and easily be put in place at a low transaction cost. Finding the best transaction to execute among all possible buyers and sellers would be difficult in the absence of a standard product. The service brokers currently provide to match buyers and sellers of a standard product could not be performed. Since generation units come in different (odd-lot) sizes, there would be no common lot size for an energy transaction. None of these problems arise for non-source-specific products.

- In order for day-ahead least-cost dispatch to occur, many hundreds of transactions among many market participants must take place during a trading window that is approximately an hour or two long. It is unrealistic to expect this volume of transactions if all transactions must be source-specific.
- If the market price changes after the transaction is executed, such that a generator that is the source for the transaction is no longer economic to operate, the source-specific transaction must be renegotiated to achieve least-cost. Given the volatility of the power market, this need will often occur. Again, this issue does not arise for non-source-specific products.
- Market participants such as financial institutions and other entities that do not own “sources,” cannot easily conduct “source-specific” transactions and would be significantly impacted. As these market participants create liquidity and typically have very high credit ratings, eliminating them or significantly impeding their operations in the market will also make it more difficult and costly (and perhaps impossible) for LSEs to achieve least-cost dispatch.¹⁵

Lastly, the proposal to eliminate non-source-specific transactions fails to consider how an LSE avoids such transactions under MRTU. MRTU contains market mechanisms to clear all bid-in load against bid-in generation. Such a “pooling” process necessarily breaks the link

¹⁵ SCE Reply Comments at 7-8 (footnotes omitted).

between a load and resources. Said another way, a ban on non-source-specific transactions would be tantamount to California's rejection of MRTU.

As should be apparent from the foregoing, the First Seller approach is superior in that GHG is accounted for at the source for in-state generation and at the point of import for out-of state resources. The transaction trail from source to sink does not need be tracked or regulated under First Seller.

II.

RESPONSE TO CPUC QUESTIONS REGARDING ADDITIONAL QUESTIONS REGARDING PREEMPTION UNDER THE FEDERAL POWER ACT

The CPUC's Ruling on Additional Legal Issue seeks parties' comments on the applicability of a line of federal Natural Gas Act cases to the question of whether the First Seller proposal is preempted by the Federal Power Act.¹⁶ Although the cases raised by the CPUC may be considered if a court is faced with a question of first impression regarding whether a state law intended to reduce the GHG emissions of electricity consumed within a state is preempted by the regulatory scheme embodied in the Federal Power Act, there is no indication that the line of cases identified by the CPUC will be more dispositive of the legal review of a First Seller approach than of a load-based approach. As set forth below, the cases identified by the CPUC support the view that a reviewing court will closely examine the effect and intent of California's statute in order to determine whether it should be preempted by the Federal Power Act.

As various parties have noted, Supreme Court precedent has directly acknowledged that a state regulation is not preempted by the Federal Power Act if compliance with FERC's economic regulation of the terms, conditions, and rates for FERC jurisdictional power sales is not prevented or thwarted by the state regulation.¹⁷ As parties note, in *Pacific Gas & Electric v.*

¹⁶ Ruling on Additional Legal Issue at 1.

¹⁷ See e.g., *Comments of Pacific Gas & Electric Company (U 39 E) on Market Advisory Committee Recommendation of "First Seller" Regulation of Greenhouse Gas Emission Under AB 32, dated August 6,*
Continued on the next page

State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983), the Court avoided preemption by narrowly characterizing federal and state goals so as to avoid a conflict between the two.¹⁸ The Supreme Court had previously come to the same conclusion when it found that a local state environmental regulation was not preempted when considered in the context of a federal regulatory scheme.

In *Huron Portland Cement Co. v. City of Detroit, et al*, 362 U.S. 440, (1960), the Court found that a city's "Smoke Abatement Code," which criminalized certain levels of smoke emissions from vessels docked in the city, was not preempted by federal laws governing ship inspection and licensing. The Court made this decision by separating out the purpose of the city's ordinance and the federal scheme. It held, "[t]he ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. ... [T]he purpose of the federal inspection statutes is to insure the seagoing safety of vessels subject to inspection. ... By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community. ... For this reason we cannot find that the federal inspection legislation has pre-empted local action."¹⁹

FERC has similarly adopted a narrow interpretation of its jurisdiction in order to avoid preemption. In its Order Granting Emergency Clarification dated July 25, 2001, 96 FERC ¶ 61,117, Docket EL00-95-031 (2001), FERC ruled that power generators could be exempt from FERC's "must offer" requirements if they could show that running a unit would result in violation of a permit, including an environmental operating limitation.

The cases upon which the CPUC seeks comment similarly try to examine the true purpose of regulations in order to determine the preemption question and all three reaffirm the

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2007, at 2; *Legal Brief of the Natural Resources Defense Council (NRDC) and Environmental Defense (ED) on the "First Seller" Approach*, dated August 6, 2007 ("NRDC/ED Brief") at 5-8.

¹⁸ See NRDC/ED Brief at 6.

¹⁹ *Huron Portland Cement Co. v. City of Detroit, et al*, 362 U.S. at 442, 445- 446 (1960).

principle that an indirect effect on a subject matter also seemingly governed by federal regulation is not alone reason to find preemption. This is consistent with the Supreme Court's more recent pronouncements that "Of course, every state statute that has some indirect effect on rates and facilities . . . is not preempted."²⁰

If a reviewing court were inclined to follow the Supreme Court's and FERC's lead as set out in the aforementioned cases, a finding that the federal scheme which governs FERC does not conflict with California's GHG regulation may be sustained.

III.

CONCLUSION

For the aforementioned reasons and those set out in SCE's *Comments of Southern California Edison Company (U 338-E) Regarding Joint California Public Utilities Commission and California Energy Commission Staff Proposal for an Electricity Retail Provider GHG Reporting Protocol* and subsequent reply briefing, SCE urges the CPUC and CEC to adopt a First Seller approach to reducing GHG emissions in California.

²⁰ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1989); *see also Northwest Central Pipeline Corp. v. Kansas*, 489 U.S. 493, 514 (1989) (State regulation was not preempted even though there may be "an incremental effect on the costs of purchasers in some market and contractual situations.")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commissioner's Rules of Practice and Procedure, I have this day served a true copy of REPLY OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO COMMENTS AND LEGAL BRIEFS ON MARKET ADVISORY COMMITTEE REPORT on all parties identified in the attached service list(s).

Transmitting the copies via e-mail to all parties who have provided an e-mail address.
First class mail will be used if electronic service cannot be effectuated.

Executed this **15th day of August, 2007**, at Rosemead, California.

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